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No. 82-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *and* COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA SPIRT, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as construed by this Court in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), prohibit an employer from requiring employees to participate in a jointly funded retirement benefit plan that pays a smaller periodic retirement benefit to a female retiree than to a male retiree of the same age with a comparable employment history?

2. In light of the reasons for which the petitioners were established as educational service organizations, the close mutual dependence between the petitioners and participating educational institutions, and the broad remedial purposes for which Congress enacted Title VII, did the court below correctly determine that the petitioners should be treated as "employers" within the meaning of that term in Title VII?

3. Did the orders of the courts below requiring the petitioners prospectively to equalize periodic retirement benefits for men and women who retire in the future constitute retroactive relief proscribed by *Manhart*?

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MEMORANDUM FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors ("AAUP") believes that the decision below was required by this Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). We urge, for the reasons more fully set forth below, that the petition for certiorari filed by the Teachers Insurance and Annuity Association ("TIAA") and the College Retirement Equities Fund ("CREF") should be denied unless the Court concludes that it is appropriate to grant

plenary review in *Peters v. Wayne State University*,[1] a closely related case also pending on petition for a writ of certiorari.

It is indisputable that the decision in *Peters* cannot be reconciled with the decision of the court below in this case. This conflict between the circuits, however, does not require plenary consideration because the points upon which the two circuit courts disagreed have already been decided in *Manhart*. In our brief *amicus curiae* in support of the petition in *Peters*, the AAUP and other *amici* suggested that an appropriate disposition there would be to grant the petition and reverse summarily on the strength of *Manhart*.[2] If the Court adopts that suggestion, the instant petition should be denied.

STATEMENT OF THE CASE

In two respects, the petitioners' statement calls for supplementation.

One relates to the history and current configuration of the TIAA-CREF annuity system. The petitioners describe themselves as "independent insurers" having no employer-employee relationship with their annuitants,[3] an assertion vital to their legal contention that they should not be deemed "employers" as that term is used in Title VII of the Civil Rights Act of 1964.[4] In fact,

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[1] *Petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794).

[2] The text of the *amicus* brief in *Peters* is reproduced for the Court's convenience in the Appendix to this memorandum.

[3] Pet. i, 16. (As used in this footnote and hereinafter, the abbreviation "Pet." refers to the petition for certiorari filed by TIAA and CREF in this Court; the abbreviation "Pet. App." refers to the appendix accompanying the petition for certiorari; the abbreviation "J.A." refers to the Joint Appendix submitted by the parties in the court below; and the word "Appendix" refers to the appendix reproduced at the end of this memorandum.)

[4] 42 U.S.C. § 2000e *et seq.* (1976 and Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

the history of the TIAA-CREF annuity system and the manner in which the system is currently structured suggest a more intimate relationship between the petitioners and their annuitants than the one described in the petition. The relationship is sufficient, under well-established judicial interpretations of Title VII, to subject TIAA and CREF to the strictures of that statute.

The other omission in the petitioners' statement involves the facility with which pension plan managers (including TIAA and CREF) have designed plans substituting unisex mortality tables for the sex-differentiated tables declared illegal by the lower courts in this case (and by courts in at least nine other cases)[5]—a fact that undermines the petitioners' assertion that the Second Circuit's decision in this case would "invite chaos in the insurance and pension industry. . . ."[6]

A. *The TIAA-CREF Annuity System.* The history of TIAA and CREF and the facts about their national retirement benefit system belie the petitioners' description of themselves as "independent insurers." TIAA and CREF provide annuity benefits to faculty members at most institutions of higher education in the United States. In all, 3,400 colleges and universities have coordinated the design and administration of their retirement programs with TIAA-CREF, creating what the petitioners have called a "national pension system of [American] higher education."[7]

The TIAA-CREF system was originally conceived and is today operated as a financial service designed to make careers in higher education more attractive and financially rewarding.[8] During World War I, the Carnegie

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[5] *See* note 28, *infra*, and accompanying text.

[6] Pet. 16.

[7] J.A. 330, 415.

[8] J.A. 172, 226, 251-54, 329. *See* W. Greenough & F. King, BENEFIT PLANS IN AMERICAN COLLEGES 8-9, 13-14, 39-49 (1969) [hereinafter cited as "BENEFIT PLANS"].

Foundation for the Advancement of Teaching established a Commission on Insurance and Annuities to examine the shortcomings in institutional pension plans then available to college and university faculty members. The Commission, consisting of representatives from the AAUP and several other educational organizations, recommended the establishment of a national pension system for employees of educational institutions.[9] TIAA was incorporated in 1918 by the trustees of the Carnegie Foundation, and was operated for many years as a subsidiary of the Foundation "with its stock held and voted by the Carnegie Corporation as a trust for the college world. . . ." [10]

TIAA and CREF are non-profit corporations that provide retirement benefit plans for faculty members and staff employees at institutions of higher education throughout the United States. TIAA-CREF annuities cannot be purchased on the open market. Individuals are eligible to enroll only if they work for an eligible institution.[11]

Each plan in the TIAA-CREF system is established by resolution of the educational institution's governing board. The institution determines for itself, in consultation with TIAA and CREF, what provisions on eligibility, participation, contributions, and retirement it wishes to include in its plan. These provisions are spelled out in the

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[9] J.A. 172, 226. The Carnegie Foundation's early involvement is described in Peters v. Wayne State University, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, Nos. 79-1658, 79-1670 & 79-1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). The members of the Commission saw two advantages to the creation of a national system: an economy of scale that would reduce the cost of annuities by eliminating agents' commissions, and portability of coverage for faculty members who moved to new institutions. *Id. See also* BENEFIT PLANS 8-14.

[10] *Peters, supra*, 476 F. Supp. at 1346. The petition here (at 3-4) describes the circumstances of CREF's incorporation.

[11] J.A. 226, 238, 470, 473.

institution's enabling resolution.[12] At many institutions (including Long Island University, the institution whose plan is challenged in this case), tenured faculty members are required to participate in the TIAA-CREF plan and must, therefore, depend on TIAA-CREF for investment and payment services.[13]

TIAA-CREF's mission is inseparable from the mission of the institutions it serves. TIAA-CREF could not function without the administrative and financial support it receives from those institutions. To call TIAA-CREF an "independent" insurer is to oversimplify its mutually dependent relationship with college and university employers.

B. *The Development of Unisex Tables.* The petition implies that the substitution of a single mortality table for the sex-differentiated tables now used by TIAA and CREF would have grave consequences for the insurance industry.[14] The petition fails to note, however, that TIAA and CREF developed no fewer than *three* unisex tables during proceedings in the lower courts, and that at least one major institution—the University of Minnesota—has had no difficulty finding insurance companies willing to use a unisex table to provide equal periodic annuity benefits for male and female retirees.

After the trial court's decision enjoining the use of sex-differentiated tables, TIAA and CREF designed three unisex plans as part of settlement discussions with the plaintiffs.[15] In correspondence with the New York State Department of Insurance in early 1980, Thomas G. Walsh, TIAA-CREF's Vice President, provided data

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[12] The procedure for establishing a TIAA-CREF plan is described in BENEFIT PLANS, *supra* note 8, at 40. *See also* J.A. 188-193 (Long Island University's "Retirement Resolution").

[13] J.A. 188.

[14] Pet. 8, 16.

[15] This history is recounted in one of the trial court opinions, Pet. App. 84a-85a, and in the Second Circuit's opinion, Pet. App. 8a.

showing that a unisex plan could be implemented without significant cost increases and without any loss of institutional participants.[16] The data were developed, Mr. Walsh wrote, "to assure ourselves that the adoption of these merged gender mortality tables will be actuarially sound." [17] These data, so persuasive to TIAA and CREF two years ago, are the best answer to the assertion in their petition that periodic benefits "must" be lower for women to avoid exhausting funds accumulated in their names.[18]

Recently, the University of Minnesota replaced its TIAA-CREF retirement plan with a new plan designed and administered by two private insurance companies (Minnesota Mutual Life Insurance Company and Northwestern National Life Insurance Company) using a unisex table to calculate retirement benefits.[19] Adoption of the new plan was prompted by concerns among male and female faculty members that lower periodic annuity payments for female annuitants were unfair and unnecessary.[20]

Retirement plans using unisex mortality tables are not difficult to design. The willingness of several companies (including TIAA and CREF) to consider such plans plainly indicates that the relief ordered in this case is appropriate.

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[16] Letter from Thomas G. Walsh, Vice President and Actuary of TIAA-CREF, to James Gardiner, Supervising Actuary in the New York State Insurance Department, Jan. 11, 1980. This letter appears in the record as Exhibit GG to the Equal Employment Opportunity Commission's "Rule 9(g) Statement of Material Facts Not in Dispute" in the District Court. (A copy of this letter is also reproduced in the Appendix following this memorandum.)

[17] Appendix 11a.

[18] Pet. 5.

[19] "U. of Minnesota Adopts Unisex Plan for Pensions: 'Right Thing to Do,'" CHRONICLE OF HIGHER EDUCATION, Oct. 13, 1982, at 25.

[20] *Id.*

SUMMARY OF ARGUMENT

The petitioners acknowledge that sex is the sole criterion used in determining the amount of periodic annuity payments made to male and female retirees whose situations are otherwise indistinguishable. While they argue that there are actuarial justifications for treating female employees differently from their male counterparts, the same asserted justifications were rejected in *Manhart*. As the Court there ruled, Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." 435 U.S. at 708.

The relief ordered by the District Court and Court of Appeals does not constitute impermissible "retroactive relief." The orders are prospective in effect. They do not involve back pay awards, do not diminish in any way the assets or obligations of the petitioners, and do not implicate any of the equitable or practical concerns noted in *Manhart*.

Although the decision of the court below conflicts with the decision of the Sixth Circuit Court of Appeals in *Peters v. Wayne State University*, upholding the use of sex-based mortality tables, *Peters*, in our view, cannot be reconciled with *Manhart*. We have accordingly suggested that summary reversal of the *Peters* decision would be appropriate. If the Court adopts that course, the instant petition should be denied. If, however, the Court should grant plenary review in *Peters*, it should also grant the petition here in order to consider the two conflicting decisions together.

ARGUMENT

I. The instant petition brings to four the number of cases pending before the Court in which retirement plans that pay smaller periodic benefits to female annuitants than to their male counterparts are challenged under Title VII.[21] They are the first pension discrimination cases to reach the Court since the decision in *Manhart*.[22] There, the Court held that an employer-operated pension plan providing equal periodic benefits to retirees of both sexes violated Title VII by requiring female participants to make significantly greater periodic contributions during their worklives than comparably situated male participants.

The employer in *Manhart* attempted to justify the disparity by arguing that there were sound actuarial reasons for treating female employees as a class differently from the class of male employees. The Court rejected that defense:

> [Title VII] makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.
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[21] Petitions were filed earlier this year in Peters v. Wayne State University, *supra* note 1; California v. Retired Public Employees' Ass'n, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); and Arizona Governing Comm. v. Norris, 51 U.S.L.W. 3187 (U.S. July 12, 1982) (No. 82-52). The petition in the latter case was granted in October. 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982).

[22] City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address . . . . Even if the statutory language were less clear, *the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.*[23]

Manhart holds that justifications premised on the asserted characteristics of women as a class do not permit an employer to require larger periodic pension contributions from female employees than from their male counterparts. TIAA and CREF now offer the same justifications in support of a form of discrimination no less substantial in its impact. Instead of requiring women to make *larger* periodic *contributions* during their worklives in order to receive the same periodic benefits as males upon retirement, TIAA and CREF ask men and women to make the same periodic contributions while they work, but then pay women *smaller* periodic *benefits* after retirement.[24]

Their reasons for treating women differently are precisely the same as the reasons rejected by this Court in *Manhart*. The petitioners argue that future annuitants must be "grouped" according to "stable, significant and objectively measurable risk classification factors," of

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[23] 435 U.S. at 708, 709 (emphasis added). *Manhart's* "focus on fairness to individuals rather than fairness to classes" is reinforced by Section 703(a)(2) of the Civil Rights Act of 1964, as amended, which makes it unlawful for an employer to "classify" employees on the basis of sex. 42 U.S.C. § 2000e-2(a)(2) (1976). *Cf.* Connecticut v. Teal, 50 U.S.L.W. 4716 (U.S. June 21, 1982) (No. 80-2147).

[24] Under the TIAA-CREF plan in effect at Long Island University, the disparity between male and female annuitants is substantial. Asume that two faculty members, one male and one female, retire at age 65, each with an accumulation of $100,000. Under a single life annuity plan, the male retiree would receive $11,964 per annum. The female retiree would receive $10,740—more than $1,200 less. J.A. 183. TIAA and CREF estimate that, on the average, male annuitant benefits under the single life option exceed female annuitant benefits by 11.3 percent per payment. J.A. 182-83.

which there happen to be two—age and sex.[25] It was precisely this kind of "grouping" that the Court rejected in *Manhart* when it declared that Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." [26]

If Title VII prohibits an employer from invoking class characteristics to justify *larger contributions* from women, it follows that those characteristics cannot justify *smaller benefits* for women. In either case, individual women suffer adverse consequences solely because they are members of a statutorily protected class. "In fact," the court below observed, ". . . it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII." [27]

Until the Sixth Circuit's decision in *Peters*, every court considering the issue rejected TIAA-CREF's proposed dis-

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[25] Pet. 5. There is a significant legal distinction, for current purposes, between employment classifications based on age and employment classifications based on sex. Both, in broad terms, are proscribed by federal law, the former by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1976 & Supp. IV 1980) (the "ADEA"), and the latter by Title VII. But the proscription in the ADEA does not apply to employee benefit plans, including retirement benefits. *See* ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). There is no equivalent exemption in Title VII. To the contrary, this Court held in *Manhart* that retirement benefit plans violate Title VII when administered on the basis of sex-based classifications. *See generally* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 536-39 (1980).

There is a significant factual distinction as well, insofar as this case is concerned. TIAA and CREF have admitted that age, not sex, is "the major factor" they rely upon in setting the level of annuity benefits. J.A. 320, 530.

[26] 435 U.S. at 708.

[27] Pet. App. 11a.

tinction between unequal contributions and unequal benefits, and held that *Manhart* prohibited the payment of smaller periodic retirement benefits to women.[28] The decision of the court below in this case is consistent with this line of cases and with *Manhart*.

Even if notions of actuarial "fairness" were germane under Title VII, it is far from clear that equity would compel the use of sex-differentiated actuarial tables. As at least four lower courts have noted, such notions may produce a result that is far from equitable for the vast majority of working women. Although women have a longer life expectancy than men, the difference is attributable to the small fraction of the female population who live especially long and the small fraction of the male population who die especially young. The vast majority of men and women participating in the TIAA-CREF system die at comparable ages, regardless of their sex.[29] For most women, therefore, a smaller monthly pension will

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[28] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, 29 Fair. Empl. Prac. Cas. (BNA) 1599 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791); Retired Public Employees' Ass'n v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F.Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F.Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds).

[29] In a matched group of 2,000 similarly situated male and female retired teachers (1,000 males and 1,000 females), 798 women will die at the same age as 798 of the men. J.A. 351-52.

generate less money over the course of their lifetimes than most men will earn. "As a result, each woman is penalized because a few women live longer and each man benefits because a few men die early." *Henderson v. Oregon*, 405 F.Supp. 1271, 1275 n.5 (D. Ore. 1975).[30]

Notions of actuarial "fairness" are in fact more difficult to formulate and apply than TIAA and CREF have suggested in their petition. But the point that bears repeating is that under *Manhart* such notions are not germane to begin with when invoked as justifications for discrimination against the members of a statutorily protected class. "Even a true generalization about the class," observed the Court in *Manhart*, "is an insufficient reason for disqualifying an individual to whom the generalization does not apply." [31]

II. In two respects, the decision of the Second Circuit in this case conflicts with the Sixth Circuit's decision in *Peters*. First, the court in *Peters* ignored the admonition in *Manhart* to "focus on fairness to individuals rather than fairness to classes," 435 U.S. at 709, and held that the TIAA-CREF plan did not discriminate against women annuitants because the aggregate "value of the retirement plan" for women as a class did not exceed the plan's

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[30] *Accord*, Norris v. Arizona Governing Committee, 671 F.2d 330, 332 n.1 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 585 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, 176, *cert. denied*, 434 U.S. 825 (1977).

For a full discussion of the actuarial arguments on which TIAA and CREF rely, *see* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 511-514 (1980); Key, *Sex-Based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1 (1979); Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUNDATION RESEARCH J. 83.

[31] 435 U.S. at 708.

value for men as a class.[32] Second, the Sixth Circuit became the nation's first court to declare that TIAA and CREF should not be treated as "employers" within the meaning of that term in Title VII.[33] On both counts, however, *Manhart* is dispositive.

A. *Reliance on Actuarial Distinctions.* The Sixth Circuit rested its decision on the comparative characteristics

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[32] Pet. App. 141a.

[33] 139a.

The instant petition seeks review of the Second Circuit decision on two other grounds: the applicability of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976), and the pertinence of discriminatory intent under Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and Furnco constr. Corp. v. Waters, 438 U.S. 567 (1978). Strictly speaking, however, the Sixth Circuit and Second Circuit decisions are not in conflict on either point, because the Sixth Circuit's opinion in *Peters* does not address the former issue and the Second Circuit's opinion in this case does not address the latter.

The Second Circuit's treatment of the McCarran-Ferguson Act is complete and correct. Moreover, the decision is entirely supportable on the separate ground that TIAA and CREF so coordinate their insurance activities with the actions of the educational institutions they service that any insulation from liability otherwise provided by the McCarran-Ferguson Act has been waived. *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231-33 (1979).

Although the Sixth Circuit's reliance on *Furnco* and *Burdine* does not conflict with any portion of the Second Circuit opinion in this case, the Sixth Circuit's decision does conflict with the decision of the Ninth Circuit in *Norris*. *Compare* Pet. App. 141a (Sixth Circuit holding that the plaintiff failed to make the showing of discriminatory intent purportedly required by *Burdine*) *with Norris, supra* note 28, 671 F.2d at 333-34 (Ninth Circuit holding that discriminatory intent need not be shown in cases challenging "facially discriminatory practices"). The Sixth Circuit's reliance on *Furnco* and *Burdine* is misplaced for the reasons explained in the *amicus* brief filed by the AAUP and other organizations in *Peters*. *See* Appendix, *supra* note 3, at 8a.

of female retirees as a class and male retirees as a class. "[W]omen live longer than men," the court observed. "Women receive smaller annuities over a longer period of time to ensure that the *value of the retirement plan for women and men* is equal." [34] In contrast, the Second Circuit avoided generalizations about classes of annuitants:

> Defendants attempt to argue that the TIAA-CREF plans are fair to both men and women because each individual participant receives a benefit package that is of actuarially equal value. This argument is unconvincing because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarially equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups.[35]

The "clear mandate" referred to by the Second Circuit comes from *Manhart* and the language of Title VII itself. Congress, as a matter of national policy, has declared that employees cannot be classified by race or sex, even when the classification can be justified actuarially or results in equal treatment of *classes* of employees. The court below properly looked at the effect of sex-segregated mortality tables on individual female employees, and, applying *Manhart*, held that the use of these tables violated Title VII. The court in *Peters* literally ignored the central holding in *Manhart* and relied on the same notions of actuarial equity that *Manhart* condemned. This is, undeniably, a conflict; but the issue is so clearly controlled by *Manhart* that the Court can resolve the conflict without granting plenary consideration in either case.

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[34] Pet. App. 141a (emphasis added).

[35] Pet. App. 12a.

B. *TIAA-CREF's Exposure Under Title VII.* The Second and Sixth Circuits also disagreed over the propriety of treating TIAA and CREF as "employers" within the meaning of that term in Title VII. The Sixth Circuit in *Peters*, observing that TIAA-CREF "does not 'employ' the plaintiffs in the conventional sense of the word," held that TIAA-CREF did not come within the reach of Title VII "simply by furnishing its services to a Title VII employer." [36] The Second Circuit acknowledged that the plaintiff "[was] not an employee of TIAA-CREF in any commonly understood sense," but went on to explain that the term "employer" as used in Title VII is construed in a functional sense to encompass persons who are not conventional employers but who nevertheless control some aspect of an employee's compensation or terms of employment.[37]

The petitioners adopt the Sixth Circuit's construction of the statute and argue that they are immune from liability under Title VII because they are independent insurers, not employers.[38] This claim ignores the extraordinarily close relationship between the institutional employers and the allied organizations (TIAA and CREF). TIAA and CREF were founded and today exist solely for the purpose of providing pensions and financial services to the employees of the nation's educational institutions. College administrators participated in the decision to create TIAA and CREF and supervised the design and implementation of the TIAA-CREF program. Educational institutions share with TIAA and CREF the responsibility for managing an important aspect of the employment relationship. This is plainly sufficient, under well-established judicial interpretations of Title VII, to subject TIAA and CREF to the Act's prohibition of discrimination.

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[36] Pet. App. 139a.

[37] *Id.* 14a. *See also id.* 60a-62a.

[38] Pet. 16-17.

Title VII extends well beyond the conventional employer-employee relationship. It reaches "agents" of an employer, employment agencies, and labor organizations, none of which "employs" potential Title VII complainants in the ordinary sense of that term.[39] Rather than prohibiting discrimination against "employees," the statute prohibits discrimination against "any *individual*" on account of "such *individual*'s" race or sex[40]—"a strong indication," in the words of one appellate court, "that the proscriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship."[41]

Title VII is a remedial statute designed to eradicate discrimination in employment.[42] Like other remedial statutes, it has been construed liberally in order to achieve the congressional purpose for which it was enacted. The lower courts have consistently construed the statutory term "employer" to include entities that control any aspect of compensation, not just salary.[43] The restrictive definition of "employer" urged by TIAA and CREF would enable companies or institutions bent on treating one class of employees preferentially to immunize themselves from Title VII liability by delegating authority over the appropriate aspect of the employment rela-

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[39] Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C. §§ 2000e, 2000e-2(b), (c) (1976 & Supp. IV 1980). *See* Sibley Mem. Hospital v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

[40] Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added).

[41] *Sibley Mem. Hospital, supra*, 488 F.2d at 1341.

[42] Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971); Silver v. Mohasco Corp., 602 F.2d 1083, 1087 (2d Cir. 1979); Craig v. Dep't of Health, Education & Welfare, 581 F.2d 189, 193 (8th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977).

[43] *See* Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391 (8th Cir. 1977); EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1261, 1263 (N.D. Ohio 1981); Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670, 696 (D. Md. 1979); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089, 1091-92 (D.N.H. 1974).

tionship to third parties. *Manhart* implicitly rejected that outcome,[44] as have other courts before and since.[45]

III. The petitioners' assertion that the courts below "disregarded *Manhart*'s admonition against the imposition of retroactive relief"[46] is incorrect for several reasons.

First and most importantly, the injunction ordered by the trial court and affirmed by the Second Circuit was on its face prospective only. As the petition indicates, the trial court decree, entered in mid-1979, required the defendants to cease using sex-differentiated mortality tables by May 1, 1980—nearly nine months later.[47]

Second, as the petition also acknowledges,[48] the accumulations credited to similarly situated men and women are "equal . . . at retirement." TIAA and CREF do not use sex-differentiated tables until a participant retires. At that point, the participant's annuity contract is "settled,"[49] and periodic benefits are derived from two tables, one for male retirees and one for female retirees. The relief ordered by the courts below applies only to retirees who, like plaintiff Diana Spirt, retire on or after May 1, 1980. The injunction does not affect the benefits of those who had already retired by that date.

Third, the remedial decree ordered by the District Court does not contravene *Manhart* in any respect. Here,

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[44] "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." *Manhart*, *supra*, 435 U.S. at 718 n.33.

[45] *See, e.g.*, Baker v. Stuart Broadcasting Co., *supra*, 560 F.2d at 391-92; Sibley Mem. Hospital v. Wilson, *supra*, 488 F.2d at 1341; EEOC v. Wooster Brush Co., *supra*, 523 F. Supp. at 1261-63.

[46] Pet. 17.

[47] *Id.* 6.

[48] *Id.* 4.

[49] Pet. App. 5a.

as there, the court did not order back pay in the form of supplemental benefits for those already retired. Here, as there, the trial court carefully avoided requiring the petitioners "to meet unchanged obligations with diminished assets." [50] Instead, the very cross-subsidization of risks approved in *Manhart* will provide the source of the relief.[51]

Finally, the equitable concerns that gave the Court pause in *Manhart* are substantially lessened today. In contrast to *Manhart*, this is not the "first litigation" challenging the use of "valid actuarial tables." [52] In view of the unanimity of the lower courts on these issues when the Second Circuit rendered its decision, the relief ordered here was hardly "a marked departure from past practice." [53] More than four years after *Manhart* and eight years after Diana Spirt commenced this action, the petitioners' claims of surprise and novelty are less than persuasive.

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[50] *Manhart, supra*, 435 U.S. at 723.

[51] *Id.* at 710. Male annuitants will not suffer the grave consequences described by TIAA and CREF in the lower courts and in this Court. Most men elect joint-survivorship annuities under which benefits are already calculated using the functional equivalent of unisex tables. J.A. 550, 592. These men, in fact, actually may gain from a switch to unisex tables. J.A. 590. As for those with single-life policies, data contained in the records here and in *Peters* show that TIAA-CREF could painlessly bring future female retirees up to the periodic benefit levels now enjoyed by their male counterparts by reallocating a miniscule fraction—something less than two percent—of the three quarters of a billion dollars of discretionary dividend income earned by TIAA-CREF each year. J.A. 588-93. This is due in part to the fact that contributions from male participants are three times as great as those from females. *See* Appendix 12a. Put more simply, TIAA-CREF has more than enough discretionary income to increase female payout rates without reducing guaranteed benefits for male retirees.

[52] 435 U.S. at 722.

[53] *Id.*

CONCLUSION

For the foregoing reasons, the AAUP believes that the decision below is correct and in full accord with the controlling decision in *Manhart*. Although the decision below conflicts with the Sixth Circuit's subsequent decision in *Peters*, we have previously suggested that *Peters* is irreconcilable with *Manhart* and that summary reversal of the judgment in *Peters* is accordingly appropriate. If the Court should adopt that course, the instant petition should be denied.

Should the Court, however, grant plenary review in *Peters*, then the instant case also should be heard. The factual background and legal contentions of the parties are virtually identical in the two cases, and the decisions are in direct conflict.

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December 8, 1982

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-794

MILDRED PETERS *et al.*,
Petitioners,

v.

WAYNE STATE UNIVERSITY,
TEACHERS INSURANCE AND ANNUITY ASSOCIATION,
and COLLEGE RETIREMENT EQUITIES FUND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

This brief is filed, with the consent of all petitioners and respondents, on behalf of the American Association of University Professors ("AAUP"), the American Federation of Teachers ("AFT"), and the National Education Association ("NEA"), *amici curiae*, in support of the petition for certiorari filed November 10, 1982.

As explained more fully below, the *amici* contend that this case is clearly controlled by the Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). Since the decision of the court of appeals is irreconcilable with *Manhart*, we suggest that it would be appropriate to grant the petition and to reverse summarily the judgment below.

INTEREST OF THE *AMICI*

The *amici curiae* are three of the nation's largest organizations of teaching professionals. Many of their members, like the petitioners in this case, participate in university pension plans managed by respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF"), two closely allied non-profit corporations created to manage a national pension system for the employees of the country's institutions of higher education.

The AAUP is a membership association of 70,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the oldest and largest association of its kind in the country. Approximately eighty percent of its members are male. The AAUP has chapters on 1,300 campuses, and eighty of those chapters engage in collective bargaining on behalf of faculty members. Since 1972, the Wayne State University Chapter of the AAUP has been the certified collective bargaining representative for faculty members at that institution.

The AAUP has long been committed to the elimination of sex discrimination in the higher education community. Even before this Court's decision in *Manhart*, the AAUP formally sought to eradicate widespread discrimination against women in the funding and management of institutional pension plans. Since 1974, the AAUP has repeatedly urged TIAA-CREF, the principal annuity association to which AAUP members belong, to

stop the practice of using sex-based actuarial tables to derive substantially lower retirement benefits for women than for men with equivalent income histories.[1] TIAA-CREF's refusal to adopt a single actuarial table for annuitants of both sexes has generated litigation between TIAA-CREF and the AAUP raising many of the same issues described in the petition in this case.[2]

The American Federation of Teachers (AFL-CIO) is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Nearly 80,000 of its 560,000 members are employed in higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 institutions across the country. Operating on the national level, as well as through its affiliated locals, the AFT is committed to the establishment and preservation of sex-neutral policies in all aspects of the employment relationships of its members.

The National Education Association is the largest organization of education employees in the United States, with a current membership of approximately 1.7 million persons. A significant number of NEA members are employed in institutions of higher education, and most of these members participate in TIAA-CREF retirement plans. One of the NEA's purposes is to safeguard the constitutional and statutory rights of its members, in-

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[1] The AAUP's own employees participate in a voluntary retirement plan managed by TIAA-CREF. Because TIAA-CREF refuses to equalize retirement benefits for males and females, the AAUP makes annual direct payments to female retirees sufficient to raise their benefits to the levels enjoyed by male retirees with comparable employment histories.

[2] The AAUP was an appellee in Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. September 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791). The AAUP, with the American Civil Liberties Union, also participated as *amicus curiae* in *Manhart* when the Court decided that case during the 1977 Term.

cluding the right of its female members to be free from sex-based discrimination in pension and annuity plans.

The *amici curiae* are well situated to speak for TIAA-CREF policy-holders with a direct stake in the outcome of this case. The views of the men and women who contribute to the TIAA-CREF pension pool and who will one day receive TIAA-CREF pension benefits may be helpful to the Court in considering and eventually resolving the issues raised in the petition.

REASONS FOR GRANTING THE WRIT

The petitions in this case and *TIAA-CREF v. Spirt*[3] bring to four the number of cases pending before the Court in which retirement plans that pay a different and smaller periodic benefit to female employees than to their male counterparts are challenged under Title VII of the Civil Rights of 1964.[4] Petitions were filed earlier this year in *California v. Retired Public Employees' Association of California*[5] and *Arizona Governing Committee v. Norris.*[6] On October 12, the petition in the latter case was granted.[7]

These four cases are the first pension discrimination cases to reach this Court since *Manhart* was decided. In that case the Court held that Title VII was violated by the establishment of an employer-operated pension plan in which retired employees of both sexes received equivalent periodic retirement benefits although female participants were required to make significantly greater periodic contributions during their worklives:

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[3] *See* note 2, *supra.*

[4] 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[5] 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262).

[6] 51 U.S.L.W. 3187 (U.S. July 14, 1982) (No. 82-52).

[7] 51 U.S.L.W. 3276 (Oct. 12, 1982).

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.
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> • • •
>
> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. . . . Even if the statutory language were less clear, *the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.*[8]

In the years since *Manhart* was decided, TIAA-CREF has continued to use sex-differentiated actuarial tables and, when challenged, has attempted to draw a distinction between the retirement plan at issue in *Manhart*, which required female employees to make larger periodic contributions in order to receive the same periodic benefits as their male counterparts, and its own retirement plan, which exacts the same periodic contribution from males and females but pays females a significantly smaller monthly benefit after retirement. Until last month's decision by the court below, however, every post-*Manhart* decision rejected that distinction.[9] The Second Circuit's recent decision in *Spirt*, another case involving TIAA-CREF retirement benefits, is typical:

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[8] 435 U.S. at 708, 709 (emphasis added). *See* Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976) (making it unlawful for an employer to "classify" employees on the basis of sex).

[9] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. Sept. 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791); Retired

> [W]e can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment accorded the female TIAA-CREF participants in this case. . . . In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII.[10]

The Sixth Circuit's attempt to resurrect the same distinction conflicts with the reasoning of this Court in *Manhart*. The court below ignored the admonition in *Manhart* to "focus on fairness to individuals rather than fairness to classes," 435 U.S. at 709, and instead equated the aggregate "value of the retirement plan" for women as a class and men as a class.[11] According to the court below, "accepted actuarial practices" offer a "legitimate non-discriminatory reason for treating female and male

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Public Employees' Ass'n of California v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds).

[10] Spirt v. TIAA-CREF, *supra* note 2, slip op. at 11-12.

[11] Peters v. Wayne State University, Nos. 79-1658, 79-1670 & 79-1671, slip op. at 6 (6th Cir. Oct. 14, 1982), reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at A-8.

annuitants differently" [12]; the court does not mention, however, that the same actuarial justification for distinguishing between classes of annuitants was considered and rejected in *Manhart*.[13]

The court also erred by holding that male and female employees at Wayne State University "receive equal compensation" under the pension plan now in effect.[14] *Manhart* expressly recognized that pension benefits are "compensation" embraced by Title VII.[15]

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[12] *Id.*

[13] 435 U.S. at 708-709.

As at least four lower courts have noted, notions of actuarial "fairness" may produce a result that is far from equitable for the vast majority of working women. Although women as a class have a longer life expectancy than men as a class, the difference is attributable to a small fraction of the female population who live especially long and a small fraction of the male population who die especially young. Eighty-four percent of all women and 84 percent of all men have the same life expectancy. For most women, therefore, a smaller monthly pension will generate less money over the course of a lifetime than most men will earn. "As a result, each woman is penalized because a few women live longer and each man benefits because a few men die early." Henderson v. Oregon, 405 F. Supp. 1271, 1275 n. 5 (D. Ore. 1975). *Accord*, Norris v. Arizona Governing Committee, *supra* note 9, 671 F.2d at 332 n. 1; Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 585 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, 176, *cert. denied*, 434 U.S. 825 (1977).

In sum: If notions of actuarial fairness were germane under Title VII, it is far from clear that equity would compel the use of sex-differentiated actuarial tables. But under *Manhart*, such notions are not germane. The actuarial characteristics of women as a class cannot be invoked as a justification for sex discrimination. "Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708.

[14] *Peters, supra* note 11, slip op. at 8, Pet. App. A-10.

[15] 435 U.S. at 712 n. 23. If pension benefits for males and females are unequal, then so is "compensation", even if take-home pay is the same.

There is a more fundamental flaw in the Sixth Circuit's decision. The court erroneously relied on *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corp. v. Waters*, 433 U.S. 567 (1978), for the proposition that Title VII complainants must "demonstrate at trial that [the employer's] motivation was discriminatory or improper. . . ." [16] These cases, however, are quite beside the mark. They are meant to apply when an employee claims that he or she was fired (or not promoted) because of sex or race, and the employer denies that that was the reason for the adverse action. When there is a dispute over the employer's true motivation in singling out an individual employee for special treatment, *Burdine* and *Furnco* provide a useful evidentiary mechanism for allocating the burden of proof. In pension discrimination cases, however, motivation is not a disputed issue. The TIAA-CREF pension plan, to borrow a phrase used repeatedly in *Manhart*, is "discriminatory on its face." [17] It singles out all women for special treatment because they are women. The question before the court below was whether Title VII permits periodic pension benefits to be computed using a classification scheme based on sex. *Burdine* and *Furnco* do not provide the answer. *Manhart* does.[18]

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[16] Peters, *supra* note 11, slip op. at 7, Pet. App. A-9.

[17] 435 U.S. at 715, 716. TIAA-CREF defends this discrimination by invoking concepts of actuarial equity. But this is irreconcilable with *Manhart's* emphasis on equal treatment for individuals rather than groups. *See* nn. 11-13, *supra*, and accompanying text. *See also* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI.L.REV. 505, 508-23 (1980).

[18] The holdings in *Burdine* and *Furnco* follow from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), decided five years before *Manhart*. Under the analysis first prescribed in *McDonnell Douglas*, proof in support of a disputed claim of disparate treatment is presented to the trial court in three sequential stages. 411 U.S. at 802-804. If, as the lower court apparently believed, the three-

In sum, the decision below is irreconcilable with this Court's decision in *Manhart* and inconsistent with an unbroken line of lower court cases that rely on *Manhart*. In the circumstances, we believe that it would be appropriate to grant the petition and to reverse summarily the judgment below.

The Court's decision to grant certiorari in the *Norris* case [19] underlines the appropriateness of summary reversal here. *Norris* raises issues that are considerably narrower than those in *Manhart* and the other post-*Manhart* cases (including this one). As the petition in *Norris* candidly acknowledges, the facts in that case are "[u]nlike previous cases where the insurance company had a possibly symbiotic relationship with the employer, or the employer took an active role in administering the allegedly discriminatory [pension plan] . . . ." [20] The employer in *Norris* neither contributes to nor supervises the administration of a retirement benefit plan. Here, by contrast, the pension plan provided by Wayne State University and TIAA-CREF is funded through employer and employee contributions and provides annuity benefits only.

The petitioners in *Norris* have gone to considerable lengths to stress the controlling nature of the *Manhart* decision, stating that the statutory question is whether, "under the reasoning of [*Manhart*]," Title VII was violated by a voluntary deferred compensation plan that allowed employees of both sexes to purchase retirement

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step analysis was meant to be applied in pension discrimination cases, one would expect to find references to *McDonnell Douglas* and *Furnco* in *Manhart*. There are, of course, no such references. So far as we have been able to determine, the decision of the court below marks the first time any federal court has sought to apply the three-step analysis of *McDonnell Douglas* in a pension discrimination case.

[19] *See* notes 6 & 7, *supra*.

[20] *Petition* in No. 82-52, at 8.

benefits on the open market.[21] *Norris* is presented to the Court as an exception to the rule in *Manhart*, not as a challenge to that rule. If *Norris* is decided on the basis of the questions presented by the petitioners—the tenuous relationship between the employer and the insurer and the "open market option" available to participants under that plan—then the decision in *Norris* will not be controlling here.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted and the judgment of the court below should be summarily reversed.

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November 12, 1982

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[21] *Id.* at i.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA
COLLEGE RETIREMENT EQUITIES FUND

[EMBLEM]

730 Third Avenue, New York, N.Y. 10017

(212) 490-9000

January 11, 1980

Mr. James Gardiner
Supervising Actuary Life Bureau
New York State Insurance Department
Two World Trade Center
New York, New York 10047

Dear Jim:

I appreciated the opportunity to talk to you yesterday about TIAA's annuity contract filing with premium rates that utilize a merged gender mortality table. As you know, these contracts will be used for funding pension benefits at institutions of higher education. In response to your request, I am enclosing:

i) a copy of the merged gender mortality table and rates for TIAA deferred annuity guarantees and for CREF.

ii) a description of the derivation of the merged gender mortality table.

iii) the TIAA deferred annuity contract and the CREF deferred annuity certificate that we are currently issuing.

iv) the distribution by sex, age and income option election of the 1978 TIAA accumulations converted to pay-out annuities.

I am also sending some information we developed to assure ourselves that the adoption of these merged gender mortality tables will be actuarially sound. These enclosed tables show the results of tests to analyze the financial

impact of the merged gender rates on TIAA deferred annuity guaranteed rates under certain "worst case" scenarios of highly unlikely anti-selection.

Table I shows the current TIAA option election percentages for males and females at time of retirement and hypothetical election percentages in our worst case scenario. Table II compares the accumulation being settled with the cost (present value) of the unisexed benefit payments, assuming that they are made a) under our current income option elections and b) under the worst case option elections. The present values were computed using separate male and female mortality tables. The comparison based on our current income option election percentages confirms the actuarial soundness of the proposed merged gender mortality table for use currently. Even this worst case income option election scenario would increase the cost of benefits under the merged-gender table by only about 1.25%. This increase in cost could be covered by about ⅔ of a year's set back to the mortality table, or by about a ¼% decrease in the pay-out annuity interest rate.

About 25% of total TIAA premiums is currently received for female participants and 75% for male participants. We estimated the increase in cost that would occur if, overnight, this percentage shifted so that 50% of our total TIAA deferred annuity premiums were remitted for female participants. Even a shift as dramatic as this would increase the cost or present value of these unisexed benefits by only about 2%; a cost that could be covered by a one year set back to the mortality table or by a reduction of about ¼% decrease in the pay-out annuity interest rate. But since a shift of this nature could occur only over time, we would be aware of it as it occurred and would adjust our deferred annuity guarantees accordingly.

We also examined the potential for institutions opting out of the TIAA-CREF pension system because their per-

centage of males is higher than the overall TIAA percentage of males. Table III shows TIAA premium income split into percentage categories based on the percentage of premiums being remitted for males at each institution. This table shows that 82% of the total TIAA premium is being remitted by institutions that have close to the TIAA average (75% male) or a higher female average.

Table IV shows all institutions with $1,000,000 or more of TIAA yearly premium that are remitting 90% or more of this premium for males. Based upon TIAA dividend rates, institutions that remit 100% of their total premiums for males would have a potential, but by no means certain, savings or increase in benefits for employees of about 1.25% of their premiums if they were to opt out of TIAA individual annuity system for a group annuity that computed unisex rates on their own experience. For an institution that remits 90% of its total premiums for males, this savings would reduce to .75% or $7,500 for each $1,000,000 of premiums. We do not expect even these few institutions to forfeit the advantages of the TIAA and CREF individual contract pension system because of such a small and uncertain potential savings. In addition, over time, it is more likely that institutions will move closer to the overall TIAA male and female average than in the other direction.

Once again, thanks for your attention to this filing and please call if I can answer any questions or be helpful to you in any way on this very important matter.

Very truly yours,

/s/ Tom
THOMAS G. WALSH
Vice President and Actuary

TGW:PG
Enclosures

MEN

Monthly Income from
$10,000 Accumulation at Age 65

Income Option	% How Electing	TIAA		CREF	
		Now	Merged	Now	Merged
Single Life	12%	$102	$98	$70	$64
Single Life, 10 Certain	15	97	93	65	61
Single Life, 20 Certain	7	87	86	56	54
Joint and Full Survivor	30	86	86	53	53
Joint and 2/3 Survivor	28	93	93	60	60
Half to Spouse	3	93	91	60	58

Basis: CREF: 4% 71 IAM (0, 1½)
TIAA: 9½% 71 IAM, (1, 2½)

Age: 65, 65

TIAA IMMEDIATE ANNUITY CONTRACTS ISSUED DURING 1978

ANALYSIS OF INCOME OPTIONS SELECTED

Option (Life)	Male				Female			
	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total
Single Life Annuities								
without a guaranteed period	685	14.7%	$ 824,108	12.3%	1,188	36.6%	$ 926,560	40.9%
with a 10 year guaranteed period	748	16.0	835,984	12.4	788	24.3	566,692	25.0
with a 15 year guaranteed period	7	.1	2,919	.0	5	.1	1,841	.1
with a 20 year guaranteed period	498	10.7	414,254	6.2	543	16.7	298,480	13.2
Installment Refund Option	108	2.3	,078	2.6	114	3.5	92,306	4.1
TOTAL	2,046	43.8%	$2,254,943	33.5%	2,638	81.2%	$1,885,879	83.3%
Last Survivor Full Annuities								
without a guaranteed period	82	1.8%	$ 103,768	1.6%	11	.3%	$ 11,118	.5%

Option (Life)	Male				Female			
	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total
with a 10 year guaranteed period	481	10.3	906,091	13.5	131	4.0	91,313	4.0
with a 15 year guaranteed period	11	.2	9,205	.1	0	.0	0	.0
with a 20 year guaranteed period	941	20.1	1,166,197	17.3	298	9.2	144,315	6.0
TOTAL	1,515	32.4	$2,185,261	32.5%	440	13.5%	$ 246,746	10.9%
Last Survivor Half Annuities								
without a guaranteed period	22	.5%	$ 43,549	.6%	1	.0%	$ 2,891	.1%
with a 10 year guaranteed period	104	2.2	208,201	3.1	21	.7	25,380	1.1
with a 15 year guaranteed period	3	.1	3,278	.1	0	.0	0	.0
with a 20 year guaranteed period	155	3.3	272,453	4.1	26	.8	16,707	.8
TOTAL	284	6.1%	$ 527,481	7.9%	48	1.5%	$ 44,978	2.0%

Joint & 2/3 Survivor without a guaranteed period	35	.8%	$ 89,650	1.3%	3	.1%	$ 3,121	.1%
with a 10 year guaranteed period	352	7.5	879,097	13.1	51	1.6	37,355	1.7
with a 15 year guaranteed period	9	.2	7,599	.1	0	.0	0	.0
with a 20 year guaranteed period	432	9.2	781,334	11.6	68	2.1	45,774	2.0
TOTAL	828	17.7%	$1,757,680	26.1%	122	3.8%	$ 86,255	2.0
TOTAL INVOLVING LIFE CONTINGENCIES	4,673	100.0%	$6,725,365	100.0	3,248	100.0%	$2,263,858	100.0%
Option (Non-Life)								
Annuity Certain	124	59.6%	$ 199,448	84.6%				
Principal and Interest	84	40.4	36,193	15.4				
TOTAL NOT INVOLVING LIFE CONTINGENCIES	208	100.0%	235,641	100.0%				

TIAA IMMEDIATE ANNUITY CONTRACTS ISSUED DURING 1978

ANALYSIS OF ANNUITY STARTING AGE

Age	MALE				FEMALE			
	Number of Annuitants	Percent of Total	Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Annual Income	Percent of Total
Under 51	378	8.1%	$ 148,523	2.2%	171	5.3%	$ 48,358	2.1%
51	10	.2	7,199	.1	19	.6	8,194	.4
52	14	.3	5,904	.1	13	.4	5,360	.2
53	22	.5	14,749	.2	16	.5	6,820	.3
54	15	.3	32,786	.5	10	.3	4,641	.2
55	51	1.1	42,934	.6	39	1.2	18,738	.8
56	50	1.1	48,302	.7	36	1.1	20,671	.9
57	51	1.1	68,059	1.0	34	1.0	22,782	1.0
58	46	1.0	45,676	.7	43	1.3	25,730	1.1
59	48	1.0	46,080	.7	47	1.4	21,053	.9
60	108	2.3	117,217	1.7	107	3.3	56,110	2.5
61	87	1.9	117,888	1.8	78	2.4	46,510	2.1
62	288	6.2	311,864	4.6	242	7.5	167,646	7.4
63	210	4.5	247,165	3.7	229	7.0	155,184	6.9
64	191	4.1	252,894	3.8	174	5.4	107,237	4.8

65	1,319	28.2	1,623,953	24.2	1,022	31.5	716,969	31.7
66	715	15.3	1,186,314	17.6	451	13.9	332,717	14.7
67	254	5.4	475,016	7.1	119	3.7	113,655	5.0
68	191	4.1	501,489	7.5	119	3.7	111,641	4.9
69	147	3.1	338,543	5.0	72	2.2	87,123	3.9
70	226	4.8	531,479	7.9	86	2.6	77,665	3.4
71	163	3.5	404,861	6.0	75	2.3	74,965	3.3
75	64	1.4	110,116	1.6	35	1.1	26,719	1.2
80	25	.5	46,354	.7	11	.3	7,370	.3
80	—	—	—	—	—	—	—	—
TOTAL	4,673	100.0%	$6,725,365	100.0%	3,248	100.0%	$2,263,858	100.0%

MERGED MORTALITY TABLE ASSUMPTIONS

	Per Cent Now Electing		Worst Case Elections	
Income Option	Male	Female	Male	Female
Single Life	12%	41%	—0—	100%
Single Life, 10 Certain	15	26	—0—	—0—
Single Life, 20 Certain	7	15	34	—0—
Joint and Full Survivor	30	11	40	—0—
Joint and 2/3 Survivor	28	5	26	—0—
Half to Spouse	8	2	—0—	—0—

COMPARISON OF PRESENT VALUE (COST) OF MERGED MORTALITY TABLE INCOME PAYMENTS WITH THE ACCUMULATION NOW BEING SETTLED

Rate Basis	Accumulation Being Settled	1971 IAM MGM 1 Current Option Elections	Comparison
TIAA Guarantees	$149,425,000	$150,105,000	100.46%
TIAA Dividend	149,425,000	149,465,000	100.03
CREF	73,620,000	73,640,000	100.03

	Accumulation Being Settled	1971 IAM MGM 1 Worst Case Option Elections	Comparison
TIAA Guarantees	$149,425,000	$152,035,000	101.75%
TIAA Dividend	149,425,000	151,295,000	101.25
CREF	73,620,000	74,845,000	101.66

TIAA Premium Income by Sex and Institutions

Percent Male	No. of Institutions	Premium	Percentage of Total TIAA Premium
90-100%	1,148	$ 34,581,000	6%
85-89%	243	62,747,000	12
65-84%	1,311	335,085,000	61
55-64%	451	63,687,000	12
0-54%	1,161	47,728,000	9
Total	4,314	$543,828,000	100%

All Institutions with TIAA Premium Volume of $1,000,000 or More and a Male Content of 90% or More

Institution	TIAA Premium	Percent Male
Jet Propulsion Lab	$ 2,715,000	99%
Draper Lab	1,090,000	96
Southwest Research Inst	1,070,000	96
Argonne National Lab	4,980,000	92
University of Virginia	2,175,000	91
Harvard University	4,440,000	90
Utah State University	1,370,000	90
University of Colorado (Boulder)	1,300,000	90
University of Notre Dame	1,000,000	90
9	$20,140,000	92%